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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNESTO THOMAS RODRIGUEZ,

Defendant and Appellant.

F040623

(Super. Ct. No. 662053-8)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

Eric Weaver, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Robert P. Whitlock and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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An amended information filed November 13, 2001, charged Ernesto Rodriguez (appellant), and his half-brother, Edmundo Rodriguez (Edmundo), jointly with murder in

violation of Penal Code section 187, subdivision (a).¹ Appellant and Edmundo were also charged with being principals in the offense where, in the commission of the crime, at least one of the principals intentionally and personally discharged a firearm causing the death of the victim (§ 12022.53, subds. (d) & (e)(1)). It was also alleged the offense was committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)). Regarding Edmundo, it was additionally alleged that he personally and intentionally discharged a firearm causing the death of the victim (§ 12022.53, subds. (d) & (e)(2)).

Following a joint jury trial, appellant and Edmundo were found guilty of second degree murder. The street gang enhancement and the vicarious discharge of a firearm enhancement were found to be true; however, the allegation that Edmundo personally discharged a firearm was found to be not true.

Appellant was sentenced to a total of 40 years to life in prison: 15 years to life on the murder conviction, plus 25 years to life for the section 12022.53 enhancement. The 10-year term imposed pursuant to the criminal gang enhancement was stayed.

FACTUAL HISTORY

On May 30, 2001, between 6:00 and 6:30 p.m., members of rival street gangs—the Eastside Fresno Bulldogs and Northside Six Deuce Diamond Crips—exchanged insults and provocative looks in the courtyard at an apartment complex in Fresno. Appellant and Edmundo were members of the Bulldogs and active participants in gang activities. Maurice Woods, a member of the Crips, ran from the breezeway of an apartment toward appellant. A fight broke out. Appellant was beaten unconscious and taken to an apartment belonging to a fellow Bulldogs member.

¹All further statutory references will be to the Penal Code unless otherwise stated.

Later that same evening, appellant, Edmundo, and other individuals were seen outside, angry, and making references to revenge. The group believed Woods had run out from an apartment belonging to Travone Polk, who was not a gang member. Although there was information to the contrary, the Bulldogs were under the impression that Polk had somehow assisted Woods or the Crips in the earlier fight. Myeisha Anglon, Polk's niece who lived with him, was warned of retaliatory attacks against Polk.

At approximately 12:30 a.m. on May 31, 2001, appellant, Edmundo, and another individual entered Polk's apartment. Anglon and Polk were inside the apartment and heading outside to sit on the stairway. After a brief struggle, Polk was shot and killed. Appellant, Edmundo, and another individual were seen fleeing the scene.

A street gang expert testified that respect "is everything to a gang member." He explained that taunting is a form of disrespect and may provoke fights between gangs. Retaliatory action, ranging from another fight to a shooting, is expected if a gang member is knocked out by a rival gang member during a fight. A non-gang member, who is perceived by the disrespected gang to have somehow assisted the opposing gang, may be the target of the retaliatory action. Further, the retaliatory action is not necessarily proportional to the disrespectful act.

Defense

Edmundo challenged the reliability and accuracy of the eyewitnesses' identification. An expert on witness identification testified regarding the various factors that affect the reliability of eyewitness identifications. He opined that this case presented many factors weighing against the reliability of the identifications.

Appellant presented the testimony of another gang expert who testified that, when a shooting is retaliatory, the gang members will generally make it known that it is gang-related. For instance, a Bulldogs member may bark as a signal. The expert further noted that Polk was shot in the buttocks and suggested Polk may have molested a female gang member who retaliated by shooting and killing him.

DISCUSSION

I. Voluntary manslaughter instructions

Appellant joins Edmundo and argues that the court erred when it failed to instruct, sua sponte, on voluntary manslaughter. Respondent does not contest the error, but contends the failure to instruct was invited error, and appellant's claim is barred on appeal.

Voluntary manslaughter committed upon a sudden quarrel or heat of passion is a lesser-included offense of murder. (*People v. Seden* (1974) 10 Cal.3d 703, 719, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12, and overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 164-178.) The trial court is under a sua sponte duty to instruct on lesser-included offenses whenever the "evidence is substantial enough to merit consideration by the jury." (*People v. Barton* (1995) 12 Cal.4th 186, 195, fn. 4.) Further, this sua sponte duty exists even if the lesser offense is inconsistent with the theory of defense elected by the defendant, or the defendant specifically requests that the jury not be instructed on lesser-included offenses. (*Id.* at pp. 195-196.) All parties, including the trial court, agree there was substantial evidence of provocation to establish voluntary manslaughter. Thus, it clearly was error to not instruct on voluntary manslaughter, and the question becomes whether it constitutes invited error.

During a discussion regarding jury instructions, the following exchange took place:

"THE COURT: Okay. Now, the other thing is that, Counsel, we've taken this up off the record, but I want to make a record of it now, since we have a few moments while the jury is still assembling, that the defendants in this case, as well as the People, are entitled to a lesser included offense instruction on voluntary manslaughter, because it is clear to me that, based on the testimony about the fight preceding this incident, that there is at least evidence sufficient to support a theory that the killing in this case, and I understand this is an identification case, but apart from that, whoever did

the killing here, that it could have been done in the heat of passion and, therefore, there would be support for a voluntary manslaughter.

“[PROSECUTOR]: By the fight, are you talking about the gang fight or the struggle for the weapon, or both?

“THE COURT: No. I don’t think there is any evidence of a struggle for a weapon. I don’t think it is necessary to go there. Because clearly there was a fight preceding this.

“[PROSECUTOR]: I understand.

“THE COURT: That is the fight I’m talking about. So the long and short of it is, each of you is entitled to that. And I think the law is clear the Court has to give an instruction on a lesser that is supported by the evidence. Unless all of you invite the error of the Court to not give it. And as I understand it, that’s exactly what all of you want to do, you want to forego the giving of any voluntary manslaughter instruction in this case, because you don’t intend to argue it to the jury. And I’m not going to give an instruction that no one is going to argue to the jury. I think it is just confusing. So if all of you are going to waive this instruction, then I’m going to delete those instructions we discussed previously, and then I’m going to instruct the jury on the crime of murder and all the allegations that have been made here and that is it.

“[COUNSEL FOR APPELLANT]: Based upon the totality of the evidence that has come forward in this trial, and my conversation with my client, he is the one that has the ultimate authority as to whether or not he wants to waive a possible conclusion, the jury can possibly conclude, based upon the evidence that this was a voluntary manslaughter type of case, I advised him of the elements, of what his exposure would be, and he has elected to leave to the jury only the allegation of murder.

“THE COURT: I don’t know, I will agree, just stating, I don’t think the defendant has a personal right and declares a personal waiver as to the issue of instructions of the jury. I think that is an issue that counsel decides. Obviously, in consideration what the defendant wants to do. I don’t take personal waivers from defendants as to what instructions are given to the jury. But, importantly, you’ve talked to your client about this.

“[COUNSEL FOR APPELLANT]: He understands it.

“THE COURT: This is not only your decision, but his as well?

“[COUNSEL FOR APPELLANT]: That is correct. That is what I want to put on the record.

“THE COURT: Is that right, [appellant]?

“[APPELLANT]: Yes. [¶] ... [¶]

“[COUNSEL FOR EDMUNDO]: Your Honor, after discussions with my client, after review of the evidence, we have also decided to waive the inclusion of lesser includeds, especially the voluntary manslaughter.

“THE COURT: Well, there is only one lesser here.

“[COUNSEL FOR EDMUNDO]: Right. Right. The – and we would withdraw the instructions on voluntary manslaughter that we had earlier requested. That was before the evidence that was given in the trial. And at this time, we would withdraw those instructions.

“THE COURT: Okay. And you’ve explained the consequence of that to your counsel –

“[COUNSEL FOR EDMUNDO]: I have.

“THE COURT: --I mean your client? [¶] [Edmundo], you understand that, sir?

“[EDMUNDO]: Yes, sir.

“THE COURT: That is what you want to do?

“[EDMUNDO]: Yes, sir.”

Later, during jury instruction conference, the court stated:

“Apart from what we have confirmed on the record there will be no discussions on the lesser includeds of voluntary manslaughter, because only you asked for them in the first place, [Edmundo’s trial counsel], and you’ve withdrawn that, and the other two of you are not asking for them for [tactical] purposes.”

In order to apply the doctrine of invited error, “it must be clear from the record that defense counsel made an express objection to the relevant instructions. In addition, because important rights of the accused are at stake, it also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake.” (*People v. Bunyard*

(1988) 45 Cal.3d 1189, 1234.) Invited error will not be found where counsel was ignorant of the choice or mistakenly believed the court was not giving it to counsel. (*People v. Cooper* (1991) 53 Cal.3d 771, 831.) Further, a defendant may not invoke a trial court's failure to instruct on a lesser-included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades the court to not instruct on a lesser-included offense supported by the evidence. (*People v. Barton, supra*, 12 Cal.4th at p. 198.)

Here, the failure to give an instruction on voluntary manslaughter is invited error. The record shows that appellant's defense counsel objected to the instruction and did so based upon a tactical choice. Counsel could reasonably have wanted to avoid a compromise verdict and rely on an all-or-nothing tactical strategy. As a result, appellant's claim that the court erred in failing to give voluntary manslaughter instructions is waived as invited error.

II. Validity of the true finding on the section 186.22 gang allegation

The jury found the criminal street gang enhancement (§ 186.22, subd. (b)(1)) to be true. The Street Terrorism Enforcement and Prevention Act (STEP Act) was enacted by the Legislature in 1988. (§ 186.20 et seq.) It is summarized in *People v. Gardeley* (1996) 14 Cal.4th 605:

“[T]o subject a defendant to the penal consequences of the STEP Act, the prosecution must prove that the crime for which the defendant was convicted had been ‘committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.’ (§ 186.22, subd. (b)(1) and former subd. (c).) In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a ‘pattern of criminal gang activity’ by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called ‘predicate offenses’) during

the statutorily defined period. (§ 186.22, subds. (e) and (f).)” (*People v. Gardeley, supra*, 14 Cal.4th at pp. 616-617.)

In this case, the court instructed the jury with CALJIC No. 6.50, as follows:

“It is also alleged that the defendants in the commission of the crime of murder as charged in Count One committed that crime for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, in violation of Penal Code section 186.22, subdivision (b)(1). [¶] If you find either defendant guilty of murder, you must determine whether that defendant committed that crime for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by members of that gang. [¶] In order to prove this allegation, each of the following elements must be proved: [¶] One, the crime of murder on which you have found the defendant guilty was committed for the benefit of, at the direction of, or in association with a criminal street gang; [¶] And two, that defendant committed that murder with the specific intent to promote, further, or assist in any criminal conduct by members of that gang. [¶] ‘Criminal street gang’ means any ongoing organization, association, or group of three or more persons, whether formal or informal, one, having as one of its primary activities the commission of one or more of the following criminal acts: murder, manslaughter, assault with a firearm, and robbery, two, having a common name or common identifying sign or symbol, and three, whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity. [¶] ‘Pattern of criminal activity’ means the commission of or attempted commission of or conviction of two or more of the following crimes, namely, voluntary manslaughter, assault with a firearm, or robbery, provided at least one of those crimes occurred after September 23rd, 1988. And the last of those crimes occurred within three years after a prior offense and the crimes are committed on separate occasions or by two or more persons.”

Appellant argues that the giving of CALJIC No. 6.50 was erroneous because it failed to correctly define the primary activity element of the criminal gang enhancement. Appellant is correct in noting that the jury was not given a definition of primary activities. As explained in *People v. Sengpadychith* (2001) 26 Cal.4th 316, the term “primary activities” implies that the commission of one or more of the statutorily enumerated crimes must be one of the group’s chief or principal occupations. (*Id.* at

p. 323; CALJIC No. 17.24.2 (2002 rev.) (6th ed. 1996).) Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining a group's primary activities. However, "[t]hat definition would necessarily exclude the occasional commission of those crimes by the group's members." (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 323.)

Acknowledging that the court failed to instruct on the definition of primary activities, we nevertheless find the error harmless under either *Chapman v. California* (1967) 386 U.S. 18, 24 [which asks whether the prosecution has proved beyond a reasonable doubt that the error did not contribute to the jury's verdict] or under *People v. Watson* (1956) 46 Cal.2d 818, 836 [which asks whether, without the error, it is reasonably probable the trier of fact would have reached a result more favorable to the defendant].

Sufficient proof of a gang's primary activities may include evidence that the group's members consistently and repeatedly committed criminal activity listed in the gang statute. (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 324.) Expert testimony may also be sufficient. (*Ibid.*) For instance, in *People v. Gardeley, supra*, a police gang expert testified that the gang, of which defendant had been a member for nine years, was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. (*Id.* at p. 620; § 186.22, subd. (e)(4) & (8).) The gang expert in *Gardeley* based his opinion on conversations he had with the defendant and fellow gang members; his personal investigation of numerous crimes committed by the gang members; as well as information from colleagues in the police department and other law enforcement agencies. (*Gardeley, supra*, 14 Cal.4th at p. 620.)

In this trial, Fresno Police Detective Jesse Ruelas, with the Multiagency Gang Enforcement Consortium and an expert in gang activity, testified he was assigned to handle all Hispanic gang activity in the metropolitan Fresno area. It was his responsibility to investigate all crimes committed by gang members or where gang

members were victims. He explained that a separate culture of gangs exists, which he described as “[t]he subculture of criminal gang activity, or criminal activity.” Detective Ruelas described a gang as “[a]ny organization, formal or informal, with three or four members having a common name, sign or signal that actively engage in criminal pattern.” Ruelas stated there were predicate crimes that criminal gangs commit in order to be considered a criminal street gang.

Detective Ruelas then focused on the history of the Bulldogs gang, which started in the late 1970’s or early 1980’s in the prison system. Ruelas explained that the Bulldogs and Crips were rivals, but co-existed unless “someone is disrespected” According to Ruelas:

“Respect is everything to a gang member. Because if you lose face, or respect, or you’re disrespected by a rival gang or another gang member, then you’re seen as weak, or you won’t defend yourself.”

As a result, if a gang member is knocked out by a rival gang member during a fight, retaliatory actions are expected. Retaliatory actions can include anything within the range of another fight to a shooting. The retaliatory act is not necessarily proportional to the disrespectful act and may be more forceful in order to send a message.

Detective Ruelas described the different levels of membership within the Bulldogs. According to Ruelas, one becomes a gang member by (1) being “jumped in” or beaten up to show toughness; (2) by growing up in a particular neighborhood; or (3) by being “primed in,” which involves committing a criminal act to gain acceptance. Gang members engage in a pattern of criminal activity to become full-fledged gang members. Associates who are “not full gang members” can also engage in that criminal activity. At times, younger gang members must work for older gang members by committing crimes, such as burglaries, petty theft, or even dealing drugs and trafficking narcotics. Ruelas defined a gang-related crime as “[a]nything to enhance or further the gang, ... [t]o enhance the reputation, intimidation, money-wise, political-wise.”

Fresno Police Officer Michelle Ochoa, also an expert in gang activity, testified that her responsibilities were with Hispanic and White gangs. She identified three Bulldogs members who had been convicted of predicate offenses with criminal enhancements. One was convicted on January 9, 2001, of attempted voluntary manslaughter and assault with a firearm. Two others were each convicted of four counts of robbery on March 30, 2000. Further, Ochoa described the Bulldogs gang as an active criminal street gang.

Appellant contends the instruction permitted the jury to find that the mere commission of these crimes, without more, established the element of primary activities. According to appellant, the instruction did not require the jury to find that these offenses were consistently committed, as opposed to being occasional occurrences, pointing out the gang was estimated to have 5,000 members. Appellant, however, does not take into account the testimony of Detective Ruelas and Officer Ochoa. As previously mentioned, Ruelas testified regarding the primary activities of the Bulldogs and their propensity to engage in narcotic sales, burglaries, and retaliatory assaults, which can range from fighting to shooting.

The testimony of Ruelas and Ochoa was uncontradicted. As the California Supreme Court in *Sengpadychith* stated, expert testimony alone may constitute sufficient proof of the primary activities of a criminal gang such as the Bulldogs. (*Sengpadychith*, *supra*, 26 Cal.4th at p. 324.)

When considering the issue of a gang's primary activities, the jury may also look to the circumstances of the charged crimes. (*People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 323; *People v. Galvan* (1998) 68 Cal.App.4th 1135, 1140.) Here, there was more than sufficient evidence that appellant participated in the murder of Polk in retaliation for his being disrespected by another gang. This is especially true in light of the fact the evidence regarding the Bulldogs' primary activities was not contested by appellant, either during trial or in closing argument.

We acknowledge that the jury was not instructed that it must find the principal or chief occupation of the Bulldogs was the commission of one or more of the enumerated felonies listed in section 186.22, subdivision (e). In light of the uncontradicted expert testimony, however, we conclude that any error was harmless. If the jury had been so instructed they would have concluded, at a minimum, that one of the principal or chief occupations of the Bulldogs gang was the commission of assaults with deadly weapons as a means of gaining or maintaining respect.

As such, the failure to give the instruction was not prejudicial and the criminal street gang enhancement was properly found to be true.

However, this presents an additional problem. Appellant was sentenced to 15 years to life for the murder, plus 25 years to life for the Penal Code section 12022.53, subdivision (e)(1), enhancement. A 10-year term was also imposed pursuant to the criminal gang enhancement (§ 186.22, subd. (b)(1)) but stayed. Section 12022.53, subdivision (e)(1), shall not be imposed in addition to an enhancement pursuant to section 186.20 et seq., unless the person personally used or discharged a firearm, which was not the case here. (§ 12022.53, subd. (e)(2).) As such, the 10-year gang enhancement imposed but stayed must be stricken.

III. Sufficiency of the evidence of primary activities to support the gang enhancement

Appellant argues there was insufficient evidence to show the Bulldogs engaged in one or more of the enumerated crimes listed in section 186.22, subdivision (e), as their primary activities. When sufficiency of the evidence is challenged on appeal, “the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) If the circumstances justify the jury’s findings, reversal is not warranted merely

because the circumstances might also be reconciled with a contrary finding. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

As discussed earlier, the evidence was sufficient to show the Bulldogs gang engaged in one or more of the enumerated crimes listed in section 186.22, subdivision (e), as their primary activities.

IV. Instruction pursuant to CALJIC No. 17.41.1

Appellant joins Edmundo in the following argument. Over the objection of Edmundo's counsel, the court instructed the jury with CALJIC No. 17.41.1. That instruction provides:

“The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.”

Edmundo claims that this instruction is “an oppressively coercive threat, undermining the function of the jury, and constitutes reversible error.” Appellant contends the instruction infringed on his right to trial by jury guaranteed by the Sixth Amendment to the United States Constitution.

Appellant's contentions with respect to CALJIC No. 17.41.1 were raised in *People v. Engelman* (2002) 28 Cal.4th 436, in which the court concluded that CALJIC No. 17.41.1 does not infringe on a defendant's state or federal constitutional right to trial by jury or to a unanimous verdict. (*Engelman, supra*, 28 Cal.4th at pp. 443-444.)

Appellant acknowledges *Engelman*, but seeks to preserve the issue for federal habeas corpus review. In any event, we reject his contention that the giving of CALJIC No. 17.41.1 constitutes prejudicial error.

V. Refusal to give a modified version of CALJIC No. 2.90

Appellant joins Edmundo in the following argument. At trial, Edmundo requested that a modified version of CALJIC No. 2.90 be given explaining the meaning of the term “abiding conviction.” The modification was refused and the jury was instructed as follows:

“A defendant in a criminal action is presumed to be innocent until the contrary is proved. And in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.”

Appellant contends that CALJIC No. 2.90 is constitutionally deficient because it fails to convey to the jury the degree of certainty required to convict appellant of a crime. In particular, appellant claims the term “abiding conviction” is ambiguous and requires further clarification. He contends that, because it was not clarified, it lessened the prosecution’s burden to prove appellant’s guilt beyond a reasonable doubt.

In *People v. Light* (1996) 44 Cal.App.4th 879, we rejected the contention that CALJIC No. 2.90 deprived a defendant of due process of law by allowing a finding of guilt on the basis of a lesser standard of proof than due process requires. We also noted that the United States Supreme Court held that the use of the term “abiding conviction” was the proper standard. (*People v. Light, supra*, 44 Cal.App.4th at p. 887.) As the court in *Victor v. Nebraska* (1994) 511 U.S. 1 stated:

“Although in this respect moral certainty is ambiguous in the abstract, the rest of the instruction ... lends content to the phrase. The jurors were told that they must have ‘an abiding conviction, to a moral certainty, of the truth of the charge.’ ... An instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty,

correctly states the government's burden of proof. [Citations.]" (*Victor v. Nebraska, supra*, 511 U.S. at pp. 14-15.)

Appellant apparently recognizes that his contention lacks merit but seeks to preserve his right to seek federal review of the question. For the reasons expressed in *Light*, we reject appellant's claim. (See also *People v. Hearon* (1999) 72 Cal.App.4th 1285, 1286-1287, and cases cited therein.)

DISPOSITION

The 10-year gang enhancement imposed but stayed is stricken. In all other respects, the judgment is affirmed.

Wiseman, J.

WE CONCUR:

Dibiaso, Acting P.J.

Buckley, J.